91-1994

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE G. HARRIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the lower courts impermissibly determined that Petitioner's post arrest, post Miranda statement "You've got me, what else can I say" was an incriminating statement and admissible, rather than an invocation of his right to remain silent.

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CITATION TO OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 956 F.2d 177 (8th Cir. 1982) and is reproduced in the Appendix to this Petition for Writ of Certiorari.

JURISDICTION

Petitioner was charged under a one count indictment of violation of Title 21, United States Code, Section 841(a)(1) and (b)(l)(b)(2)(1), possession of cocaine with intent to distribute, in the United States District Court for the Eastern District of Missouri. Petitioner was convicted after a jury trial on February

5, 1991. Petitioner's conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on February 5, 1992 (reproduced in Appendix). Petitioner's Motion for a Rehearing En Banc/by Panel was filed on February 19, 1992 (reproduced in Appendix), and the same was denied on March 18, 1992 (reproduced in Appendix).

Jurisdiction of this Honorable Court to review the judgment of the Eighth Circuit is invoked by Petitioner under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war for public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Harris was charged and convicted of possession of cocaine with the intent to distribute, under Title 21, United States Code, Section 841(a)(1) and (b)(l)(b)(2)(1). The case was heard in the United States District Court for the Eastern District of Missouri, by the Honorable Jean C. Hamilton. While in police custody, Petitioner allegedly stated to the police in response to questioning, "You've got me, what can I say?" (Tr. 126).

At trial, the statement was admitted into evidence over Petitioner's objections. The U.S. Attorney made reference to this alleged statement and Petitioner's silence in his closing argument (Tr. 241). Petitioner objected and moved for a mistrial on the grounds that such was an impermissible comment on the Petitioner's Constitutionally protected right to remain silent by inferring guilt by silence. The objection and mistrial motion were overruled and there is no attempt at a curative instruction (Tr. 242).

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

This Honorable Court should grant this Petition for Writ of Certiorari for the decision affirmed below flatly contradicts this Honorable Court's holding in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 1976 and the most recent case dealing with the issue of prosecutorial use of a Defendant's post arrest, post Miranda silence in *Wainwright v. Greenfield*, 106 S.Ct. 634 1986.

ARGUMENT

Petitioner contends that the District Court committed prejudicial error in allowing the U.S. Attorney to make an impermissible reference to Petitioner's post arrest, post Miranda invocation of his right to remain silent. Such references violated Petitioner's Fifth Amendment Rights to remain silent as well as the fundamental fairness requirement of the Fourteenth Amendment due process clause. This ruling by the District Court, as well as the Eighth Circuit Court of Appeals, clearly contradicts the principle and standard espoused by the decision of this Honorable Court in *Doyle v. Ohio*, 426 U.S. 610; 96 S. Ct. 2240 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284; 106 S. Ct. 634 (1986).

This Honorable Court has stated that a prosecuting attorney cannot make comments on references towards a Defendant's right to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240 (1976). In *Doyle*, Defendant was arrested and charged for selling narcotics to an undercover police officer. Upon the reading of his rights per Miranda, the Defendant invoked his right to remain silent. In doing so, Defendant made statements such as "What's this all about?" and "You've got to be crazy," and the like. *Doyle* 426 U.S. 610, 96 S. Ct. 2240, at 2243. Upon cross examination, the prosecutor made numerous reference to the fact that the Defendant did not offer an explanation earlier at the time he was arrested. The District Court allowed this as proper impeachment tactics, and the Defendant was convicted. The U.S. Appellate Court affirmed the conviction and this Honorable Court granted Certiorari.

This Honorable Court reversed and remanded, stating that the use of references to a Defendant's right to remain silent cannot be used for impeachment purposes. Mr. Justice Powell, in delivering the opinion of this Honorable Court, reasoned that to allow such comments would be fundamentally unfair to promise

a Defendant that he has the right to remain silent, and yet to allow the State to use that silence against him. While Mr. Justice Powell commented that silence in general has little probative value due to its latent ambiguity, the primary emphasis of his opinion focused upon need to protect an accused of being misled and deceived by invoking his right to remain silent. *Doyle*, 426 U.S. 616, 618, 1976.

These holdings espoused in *Doyle* by Mr. Justice Powell were not limited to scenarios involving impeachment. This Honorable Court later expanded the rational in *Doyle* to prohibit the prosecution from commenting on a Defendant's post arrest, post Miranda silence as evidence of sanity. *Wainwright v. Greenfield*, 474 U.S. 284; 106 S. Ct. 634 (1986). In *Wainwright* the prosecutor attempted to use the Defendant's exercise of his right to remain silent as evidence that would contradict the Defendant's claim of *insanity*. This Honorable Court held *Doyle* to be applicable, for the same fears regarding the implicit assurance contained in the Miranda warnings were in jeopardy. Encompassing *Doyle* as a lynch pin, Mr. Justice Stevens reasoned that regardless of how a reference to silence may be used, whether for impeachment or as evidence for sanity, the same protections must apply. Mr. Justice Stevens stated, "In both situations, the State then seeks to make use of the Defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach and the consequent penalty are identical in both situations." *Wainwright* 474 U.S. 293; 106 S. Ct. 634, 639 1986. Hence, any attempt to undermine the implied assurance that the exercise of one's right to remain silence would not be used against him is fundamentally unfair.

The decision made by the District Court and the U.S. Court of Appeals clearly undermines the principles of *Doyle* and *Wainwright*. Under the facts of this case, Petitioner was arrested and given his Miranda rights. Upon the reading of the rights, Petitioner invoked his right to remain silent by stating "You've got

me, what else can I say." After invoking this right, the interview was terminated. During the trial, the government was allowed to introduce into evidence the statement made by Petitioner as to his acceptance of his right to remain silent. The prosecution then made reference to this statement, as well as the fact that Petitioner concluded the police interview, during his closing argument.

The U.S. Court of Appeals, for the Eighth Circuit, held that the *Doyle* principle was inapplicable. Although that court recognized the importance of *Doyle's* safeguards, it held that the statements made by Petitioner constituted a waiver of his right to remain silence. Thus, no such implied promise existed.

Such a conclusion cannot be deemed consistent with *Doyle v. Ohio* reasoning. The rationale in *Doyle* emphasized the importance of safeguarding the implied promise found in the Miranda rights and the protection of one who exercises that right. Petitioner was given that implied promise when the Miranda rights were read to him. His statement "You've got me, what else can I say" was his invocation of that right to remain silent. The fact that Petitioner invoked his right to remain silent upon conclusion of the Miranda warnings clearly shows that inducement was offered and accepted. Because of the importance attached to this inducement, this Honorable Court would not allow another court to find a waiver of said rights based upon a statement which invoked his rights. In *Doyle*, this Honorable Court did not find a waiver of one's right to remain silent, even though the Defendant responded to subsequent questioning with verbal statements. Clearly, Petitioner's statement cannot be deemed any more incriminating than the statements made by the Defendant in *Doyle*. The finding of a waiver of one's right to remain silent based on similar facts in this case clearly contradicts the Honorable Court's decision in *Doyle*.

This Honorable Court has clearly stated that it is impermissible for the prosecution to comment on a Defendant's right to remain silent when such silence is induced in view of the Miranda warnings. The rationale espoused by this Honorable Court in *Doyle v. Ohio*, clearly states that such references, even for impeachment purposes, are fundamentally unfair and violate Defendant's due process rights under the due process clause of the Fourteenth Amendment. This rationale which safeguards implied assurances found in the Miranda warnings, was expanded by this Honorable Court to situations outside the sphere of impeachment by *Wainwright v. Greenfield*. Because the facts surrounding Petitioner's invocation of his Fifth Amendment Right to remain silent are so closely akin to the facts in *Doyle*, the decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court's allowance of the prosecution to comment upon Petitioner's silence flatly contradicts this Honorable Court's decision in *Doyle* and *Wainwright*.

CONCLUSION

WHEREFORE, for the reasons, law, equity and other considerations presented, Petitioner prays that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2223

United States of America,
Appellee,

v.

Leslie Gordon Harris,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 15, 1991
Filed: February 5, 1992

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

On February 5, 1991, a jury found Leslie Gordon Harris guilty of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(ii)(1) (1988). Harris appeals his conviction, claiming various acts of prosecutorial misconduct and improper admission of evidence. We affirm.

I. BACKGROUND

On the evening of August 7, 1989, two St. Louis police officers were conducting surveillance of a street near a residence of Harris. The officers sought to arrest Harris for first degree murder as the gunman in a drive-by shooting. Witnesses to the shooting had positively identified Harris as the killer from a series of photographs. The officers did not have a warrant for Harris's arrest.

The officer eventually observed Harris drive a car into a nearby parking lot. After approaching the car, the officers stopped Harris as he began to exit, identified themselves, and ordered Harris to place his hand on top of the car. The officers informed Harris that he was under arrest for first degree murder.

One of the officers searched Harris and the car, looking for the gun used in the drive-by shooting. The officer found a Luvs brand diaper box sitting on the passenger side of the car's front seat. When the officer searched the box, he discovered two bags containing a white substance, later confirmed to be cocaine. The officers informed Harries that he was also under arrest for possession of cocaine. They then hand-cuffed Harris and read him his *Miranda* rights.

After his arrest, Harris consented to a search of his apartment. During the search, the police discovered additional evidence including a scale, a box of baggies, personal papers, and a gun-cleaning kit. Harris eventually was taken to the St. Louis Police Department, Homicide Division, where he was questioned. At this time, Harris indicated that he remembered and understood his *Miranda* rights. The police officers asked Harris if he had any statements to make concerning either the homicide or the cocaine located in his car. Harris simply hung his head and responded: "You got me, what else can I say." Harris then asked for an attorney and the questioning ceased.

Harris was initially convicted of homicide in state court and later convicted of possession of cocaine with intent to distribute in federal court. Before the start of the federal trial, the parties and the court orally agreed the neither the term "homicide" nor any evidence of the murder would be admissible. Contextual background statements, however, explaining that the officers went to Harris's residence on "an unrelated matter and an un–related investigation" would be admissible. Trial Transcript at 8.

II. DISCUSSION

Harris raises several issues on appeal, not all of which merit discussion. We first address Harris's contention that the district court erred in rejecting his arguments that both his warrantless arrest and the subsequent search of his car were illegal and, therefore, the evidence seized during the searches of the car and the apartment as well as Harris's incriminatory statements were inadmissible fruits of the poisonous tree.[1] *See Wong Sun v. United States*, 371 U.S. 471 (1963). We review a district court's determination of whether probable cause existed for a warrantless arrest under the clearly erroneous standard. *E.g., United States v. Calkins*, 906 F.2d 1240, 1244 (8th Cir. 1990). We find no error here. The witnesses' identification of Harris as the gunman in the drive-by shooting provided the officers with sufficient probable cause to believe that Harris had committed the murder. Likewise, we find no error in the district court's conclusion that the search of Harris's car was legal. An officer may open a container found in the passenger compartment of a car during a search incident to a valid arrest. *New York v. Belton*, 453 U.S. 454, 460-61 & n.4 (1981). Because both Harris's arrest and the search of his car were completely within the law, neither the evidence discovered during the two searches nor Harris's statements were fruits of the poisonous tree.

Harris also claims that the district court committed prejudicial error in overruling his objection and motion for mistrial after the prosecutor made an impermissible reference to Harris's murder charge during opening statements. The prosecutor explained the surrounding context of Harris's arrest by stating that the "police department targeted Mr. Harris for arrest, in an unrelated crime." Trial Transcript at 70. Harris initially argues that the statement violated the pre-trial agreement. We disagree. The trial court did

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[1]Harris apparently does not challenge the consensual search of his apartment other than as a fruit of the earlier illegal arrest and car search.

not abuse its discretion in permitting the prosecutor's statement. Although the statement does not mirror the exact language discussed before trial, it is sufficiently similar to pass muster. The essence of the agreement, that neither party directly refer to the murder charge, was not violated. Harris further argues that the statement was irrelevant, prejudicial, and an inadmissible reference to a prior crime. We review a trial court's ruling concerning objections based on relevance and prejudice for abuse of discretion only. *E.g., United State* [sic] *v. Johnson*, 934 F.2d 936, 942-43 (8th Cir. 1991). We see no abuse here. The comment is relevant to explaining the basis for the police investigation of Harris, and the prejudicial effect, if any, is minimal. Furthermore, although references to other crimes generally are inadmissible, the prosecution is entitled to explain the circumstances surrounding the investigation and arrest of a defendant. *United States v. Savage*, 863 F.2d 595, 599 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *United States v. Moore*, 735 F.2d 289, 292 (8th Cir. 1984).

Harris contends that the district committed prejudicial error in admitting his incriminatory statement, "You got me, what else can I say," because that statement is ambiguous and misleading. According to Harris, his statement is not a clear admission of guilt to the possession charge. The officer had asked Harris about the murder as well as the possession charge. Harris's statement, therefore, might only have been an admission to the murder charge. Moreover, Harris asserts that the statement was misleading because its full context was never revealed to the jury. Although the jury knew that the officer had questioned Harris about another matter, the jury never learned that Harris made his statement in direct response to a question about both the murder and the possession charge. As noted above, objections based on relevancy and prejudice are within the sound discretion of the trial court. *Johnson*, 934 F.2d at 942. We find no basis on which to disturb the trial court's decision that the probative value of

Harris's statement significantly outweighed its prejudicial effect even though the jury did not know the statement's full context. Any ambiguity in the statement is an issue for the jury to resolve and Harris had ample opportunity to explain the statement's context and meaning to the jury.[2]

Harris claims that the district court committed prejudicial error in permitting the prosecutor to make references to other bad acts of his during cross-examination of certain defense witnesses. The prosecutor impeached the witnesses by asking them whether they previously had made false statements or tampered with evidence on behalf of Harris at Harris's request. We see no abuse of discretion here. Evidence probative of a witness's truthfulness is admissible to impeach the witness. *E.g., United States v. Fuller*, 887 F.2d 144, 147 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2592 (1990). Likewise, evidence showing a witness's bias is almost always admissible. *United States v. Abel*, 469 U.S. 45, 52 (1984). The prosecutor's questions went directly to the credibility and bias of Harris's witnesses. Moreover, no error occurred in permitting inquiry into the witnesses' underlying reasons for making false statements or tampering with evidence, because this helped the jury to evaluate the witnesses' current testimony. Even if the prosecutor's questions indirectly revealed prior bad acts of Harris's, evidence may be inadmissible for one purpose yet still be admissible for another. *See, e.g., United States v. Helmel*, 769 F.2d 1306, 1319 (8th Cir. 1985).[3] Finally, we do not agree with Harris that the prejudicial effect of the

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[2]We note that Harris did not need to reveal the murder charge to explain the context of his statement. His counsel simply could have clarified on cross-examination of the officer that the statement was made in direct response to a question concerning an unrelated matter as well as the possession charge.

[3]We note that Harris's counsel did not request a limiting instruction and we see no clear error in the district court's failure to give one on its own initiative.

questions so outweighed their probative value that the trial court abused its discretion in permitting the prosecutor to ask them.

Harris also argues that the district court committed prejudicial error in overruling his objection and motion for mistrial after the prosecutor allegedly made an improper reference in closing arguments to Harris's silence during questioning. During his closing argument, the prosecutor reviewed the circumstances of Harris's confession and finished by noting that after making the incriminating statement, "[Harris] conclude[d] the interview." Trial Transcript at 240-41. Reference to the silence of an accused usually is impermissible, because it is fundamentally unfair for the government to induce silence through *Miranda* warnings and then later use this silence against the accused. *See Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). Where the accused initially waives his right to remain silent and agrees to questioning, however, no such inducement has occurred. If the accused subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused. *See United States v. Collins*, 652 F.2d 735, 740 (8th Cir. 1981), *cert. denied*, 455 U.S. 906 (1982). The prosecutor's commentary, therefore, was permissible.

III. CONCLUSION

We have considered Harris's other arguments on appeal and find them to be without merit. We affirm his conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 91-2223

UNITED STATES OF AMERICA,
Appellee,

vs.

LESLIE HARRIS,
Appellant.

APPELLANT'S MOTION FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, BY PANEL

Comes now Appellant, Leslie Harris, by and through his attorneys of record, Shaw, Howlett & Knappenberger and for his Motion for Rehearing by Panel, states that the Court of Appeals, as shown by its opinion of January 3, 1992, has overlooked and/or misinterpreted material matters of law and fact in the following respects, to-wit:

(a) The Appellate Court impermissibly determined that the appellant's post-arrest, post-Miranda invocation of his right to remain silent was an incriminating statement and admissible.

Harris was arrested on two separate charges, only one of which was tried in the federal court. Harris was advised of his Miranda rights and asked if he wished to make a statement. He said, "you've got me, what else can I say?" In its opinion of February 5, the Federal Court of Appeals addressed the issue of whether the prosecutor's reference to this statement was improper. The court decided that Harris' statement must have been an admission of something (either one crime or the other or both) and that therefore the probative value outweighed any prejudicial effect.

However, in making the statement, "you've got me, what else can I say", in response to the question of whether he wanted to make a statement, the defense was simply invoking his right to silence as explained to him by Miranda. He was not making a confession of either crime. At the very least, the statement was ambiguous, because it could have related to either crime for which he was being arrested, and because its impossible to determine by the words alone exactly what the defendant was saying.

However, appellant's argument is that the statement is not incriminating, and is an attempt to invoke his fifth amendment right to remain silent. It is established law that it is impermissible for the state to comment on the defendant's exercise of that right. *Doyle vs. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In the United States Supreme case of *Doyle vs. Ohio*, supra, the statements made by the defendant were, "what's this all about?", at 2243 and, "you've got to be crazy," and "I don't know what you are talking about," at 2243. In that decision, the court found that those statements were insufficient to allow the state to comment on the defendant's asserting his right to remain silent.

The defendant's statement, "you've got me, what else can I say?" was analogous to the statement in *Doyle* and was clearly too ambiguous to be considered a waiver of appellant's constitutional right to remain silent. Therefore, references by the Assistant United States attorney to such a statement was clearly in violation of the defendant's rights to remain silent pursuant to the United States Constitution.

In addition, the statements made by the appellant were made during a custodial interrogation. The police in this case had reasonable grounds to believe that a crime had been committed and that the defendant had committed it. Furthermore, at the time of the interrogation, the investigation was focused directly on the

defendant. Since this statement was made during a custodial interrogation, it is forbidden by *Miranda*. *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d, 694 (1966).

(b) The Court of Appeals improperly determined that the prosecutor's improper reference in closing arguments to Harris' silence after his statement invoking his Fifth Amendment rights was not error. But, the Court of Appeals determined that it is usually impermissible to comment on the silence of the accused. *Doyle vs. Ohio*, 426 U.S. 610, 617-18 (1976). The Court of Appeals determined that since Harris made a "confession" in his statement, "you've got me, what can I say", that it was permissible for the prosecutor to comment on his subsequent silence. However, as explained previously, Harris' statement was not a "confession" but instead an invocation of his right to silence. Therefore, any conversation between the police and the accused is no longer proper. *Doyle*, supra.

(c) The Court of Appeals did not properly interpret the law and facts regarding defendant's warrantless arrest and subsequent search of his car. For an arrest to be valid, the Fourth Amendment to the United States Constitution requires it be based on probable cause. *U.S.A. vs. Jones*, 759 F.2d 633 (8th Cir. 1985). Probable cause exists to make a warrantless arrest when, at the moment of the arrest, the collective knowledge of the officers involved, is sufficient to warrant a prudent man in believing that the defendant has committed or was committing an offense. *Beck vs. Ohio*, 379 U.S. 89, 91, 85, S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). The district court determined that probable cause existed. However, the officers stated that they based the arrest on witness' statements and photographs, but were unable to provide specifics. This does not rise to the level of probable cause as annunciated in *Beck*, supra. Therefore, all events seized as a result of a search subsequent to this illegal arrest is inadmissible as fruits of the poisonous trait. See *Wong Sun vs. U.S.A.*, 371 U.S. 471 (1963).

(d) The Court of Appeals impermissibly allowed the prosecutor to make a reference to Harris' State murder charge during opening statements. The prosecutor used the term "unrelated crime". However, a pretrial agreement specified that it would be allowable to use the term unrelated matter and/or unrelated investigation. Clearly, it is far more prejudicial to use the term "unrelated crime" than it is to use the term unrelated matter or unrelated investigation. By allowing prosecutor to use such a statement, the district court committed prejudicial error.

(e) The Court of Appeals improperly determined that there was no prejudicial error in the district court's permitting the prosecutor to make references to defendant's other crimes, wrongs or acts. It is true that evidence of witness' truthfulness is admissible to impeach the witness. U.S.A. v. Fuller, 887 F.2d 144, 147 (8th Cir. 1989), cert. denied, 110 S.Ct. 2592 (1990). However, in the present case, the prosecutor's first reference to other crimes came during his opening argument when he first mentioned an "unrelated crime". The next instance came when Witness Tim Baker was questioned by the prosecution. In cross examination, prosecutor asked questions about whether the witness had even been convicted of the offense of tampering with evidence. However, he also asked him if it had been connected with the defendant. When the witness answered yes, it was clear that Mr. Harris' prior bad acts were again before the jury.

Not only is this impermissible but is barred by Federal Rule of Evidence 404(b). That rule prohibits character evidence of the defendant from being admitted except when used to rebut character evidence put forth by the defendant.

Furthermore, the foregoing evidence was not relevant to any material issue raised at the trial. In *U.S.A. v. Johnson*, the Eighth Circuit Court of Appeals determined that evidence admitted under Rule 404(b) must meet the following conditions:

1. The evidence of a bad act or other crime is relevant to immaterial issue raised at trial;

2. The bad act or crime is similar in kind and reasonably close in time to the crime charged;

3. There is sufficient evidence to support a finding by the jury that the defendant committed the other act or crime; and

4. The potential prejudice of the evidence does not substantially outweigh its probative value. *U.S.A. vs. Johnson*, 934 F.2d 936 (8th Circuit 1991). In the present case, there is absolutely no relevancy, or similarity in crime and the potential prejudice is far more substantial than any probative value.

Wherefore, for the above-stated reasons, Appellant respectfully requests that this honorable court grant to him a rehearing of this matter.

Shaw, Howlett & Knappenberger

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A copy hereof mailed, first-class, postage prepaid, this 19th day of February 1992, to the United States Attorney's Office, U.S. Court and Custom House, 1114 Market Street, St. Louis, Missouri 63101

/s/ James J. Knappenberger

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2223EMSL

United States of America,
Appellee,

vs.

Leslie Gordon Harris,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 18, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

PROOF OF SERVICE

The undersigned certifies that three copies of the foregoing were mailed this 10th day of June, 1992, by first class mail, postage prepaid, to: Mr. James Steitz, Office of U.S. Attorney, U.S. Courthouse, 1114 Market St., St. Louis, Missouri 63101 and Solicitor General, Department of Justice, Washington, D.C. 20530.

James J. Knappenberger